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No. .....

IN THE

Supreme Court of the United States

October Term, 1982

ALI GALEB AHMED, et al.,

Petitioners, Plaintiffs,

vs.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION, INC., et al.,

Respondents, Defendants.

PETITION OF ALI GALEB AHMED, et al. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether § 167(4), New York Insurance Law, exempting marine insurers from the direct action requirements which apply to all other liability and indemnity insurers under § 167(1), New York Insurance Law, violates the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and of Article 1, § 11, of the Constitution of New York, by precluding seamen from enforcing unsatisfied Jones Act judgments in a direct action against the marine insurer of the seamen's insolvent employer.

2. Whether, in an admiralty action by seamen seeking to enforce unsatisfied Jones Act judgments by a direct action against a marine insurer under the terms of the maritime contract of insurance issued by the insurer to the seamen's insolvent employer, general maritime law should be applicable to protect the seamen's rights, rather than the law of a State which would defeat such rights, in order to effectuate the intent of Congress that Jones Act rights are to be implemented by the application of uniform, harmonious and liberal principles of federal law.

LIST OF ALL PARTIES TO THE PROCEEDING

The following twenty-six individuals are the plaintiffs in this action and the petitioners herein:

Ali Galeb Ahmed, Ali M. Albakri, Muhammed Ali Alhadi, Roger N. Baker, Edward T. Barth, Arturo Cintron, Julian Deveaux, Saleh M. Elmalahi, Frank Evans, Jr., Francois Gomis, Mahlon Haney Groover, William R. Hepler, John M. Howard, Ovidio Joya, Joseph H. Kopp, Trinidad Lopez, John P. Mackey, Nicanor R. Oliva, Nicholas Padilla, Ralph L. Poole, Richard A. Rogero, Floyd N. Steed, James L. Thibedeaux, Ashley Washington, Carlton J. Williams and Theodore Jackson Yeager.

The only defendant and respondent herein is American Steamship Owners Mutual Protection & Indemnity Association, Inc., a New York corporation.

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I.—Certiorari should be granted to determine whether the equal protection rights of seamen, petitioners herein, will be violated if they are precluded from enforcing unsatisfied Jones Act judgments by the application of a state law, (§ 167, New York Insurance Law) which as amended, purports to exempt marine insurers from the basic provisions of the statute authorizing direct actions against all liability and indemnity insurers for the enforcement of unsatisfied judgments against their insolvent insureds. 13

II.—Certiorari should be granted to determine whether, in order to effectuate the intent of Congress that there be uniformity and harmony in the exercise of admiralty jurisdiction over Jones Act rights, general maritime law should govern the rights of seamen to enforce unsatisfied Jones Act judgments. 22

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALI GALEB AHMED, et al.,

Petitioners, Plaintiffs,

VS.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION, INC., et al.,

Respondents, Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Ali Galeb Ahmed, et al, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on March 17, 1983.

OPINIONS BELOW

The initial Memorandum of Decision of the United States District Court, Northern District of California, filed on January 26, 1978, is reported at 444 F. Supp. 569 (1978) and is printed in Appendix A hereto. The judgment of the said United States District Court dismissing the plaintiffs' action on January 28, 1978, is printed in Appendix B hereto. The initial opinion of the United States Court of Appeals, Ninth Circuit, affirming in part and remanding in part, is reported at 640 F. 2d 993 (1981) and is printed in Appendix C hereto. The subsequent Memorandum of Decision of the United States District Court, Northern District of California, filed January 28, 1982, is unreported and is printed in Appendix D hereto. The judgment of the said United States District Court, ordering summary judgment in favor of the defendant and dismissing the plaintiffs' causes of action with prejudice, was entered on February 5, 1982, and is printed in Appendix E hereto. The subsequent opinion of the United States Court of Appeals, Ninth Circuit, affirming the judgment of the said United States District Court, is reported at 701 F. 2d 824 (1983) and is printed in Appendix F hereto. The judgment of the said United States Court of Appeals was filed and entered March 17, 1983, and is printed in Appendix G hereto.

JURISDICTION

The judgment of the United States Court of Appeals, Ninth Circuit, (Appendix G, infra), was entered on March 17, 1983, affirming the summary judgment of the United States District Court, Northern District of California, entered on February 5, 1982, in favor of the defendant and dismissing the plaintiffs' causes of action with prejudice. (Appendix E, infra.) No petition for rehearing was filed. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 28(4)(c)

Since this proceeding draws into question the constitutionality of § 167(4) of the New York Insurance Law and neither the State of New York nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(b) may be applicable. Accordingly, this petition shall be served upon the Attorney General of the State of New York. No court of the United States, as defined by 28 U.S.C. § 451, has certified to the Attorney General of New York, pursuant to 28 U.S.C. § 2403(b), the fact that the constitutionality of § 167(4) of the New York Insurance Law was drawn in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Article III, Section 2, Clause 1, and the Fourteenth Amendment, Section 1, of the United States Constitution; Article 1, Section 11, of the Constitution of New York; Sections 46(21), 112(2)(c), and 167 (1)(3)(4) of the New York Insurance Law; and 46 U.S.C. § 688, all of which have been set forth in Appendix H, infra.

STATEMENT OF THE CASE

This action was originally commenced in the Superior Court of California, City and County of San Francisco. It was removed to the United States District Court, Northern District of California, pursuant to the defendant's petition under 28 U.S.C. § 1441. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 on the ground that the defendant corporation was a citizen of New York and the plaintiffs were citizens of states other than New York or citizens of foreign states.

In the District Court the case was submitted for decision upon an agreed statement of facts. The plaintiffs, petitioners herein, are 26 seamen who were injured at various times during 1969-1971 while serving on vessels owned by three New York shipping companies, Amercargo, Inc., Amercargo Shipping Corp. and American Leader, Inc. Each of these companies (hereinafter collectively referred to as "Amercargo") was insured by the defendant, American Steamship Owners Mutual Protection and Indemnity Association ("the Association"), a New York corporation which is a non-profit mutual insurance association engaged in the business of providing marine protection and indemnity insurance to the shipowners who are the members of the association. During 1969 and 1970, the Association insured Amercargo against risks of loss for personal injuries sustained by crew members in the course of their employment aboard Amercargo's vessels. The policies were negotiated and signed in New York.

Plaintiffs filed suits against Amercargo in the California state court to recover damages for their per-

sonal injuries. Amercargo defended the suits, but the Association declined to exercise its right under the terms of the insurance contract to supervise the litigation. In 1973, after all of Amercargo's attorneys had been granted leave to withdraw because of Amercargo's failure to pay its bills, default judgments were entered against Amercargo in favor of each plaintiff. Because of Amercargo's insolvency, the plaintiffs were unable to satisfy their judgments. Creditors' claims were submitted in Amercargo's bankruptcy proceedings in the United States District Court for the Southern District of New York. The total amount of the judgments for claims occurring during 1969 and 1970 was $557,015.54. Amercargo's policy had a deductible of $190,000.00. None of the plaintiffs' judgments have been satisfied.

For the 1969 insurance year Amercargo paid to the defendant the sum of $272,641.48 for premiums and the sum of $33,130.78 as partial payment of an assessment of $99,392.36 for that year. It was also credited in the total amount of $28,860.48 for personal injury claims which it satisfied in 1970. Defendant later assessed Amercargo for the 1969 year in the sum of $89,282.53. Amercargo paid nothing and received no credits toward this assessment.

During the period from January 1, 1970, through June, 1971, Amercargo made payments for premiums and other charges to the defendant, and it also received credits, totaling $424,525.70. In 1972, 1973 and 1974 the defendant assessed Amercargo in the total sum of $217,235.96 for the 1970 insurance year. These assessments were never paid.

The charter of the defendant provides, in part, that the kinds of insurance or reinsurances to be undertaken by the corporation are those described in paragraph 21 of Section 46 of the Insurance Law of the State of New York, "including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person." (Agreed Statement of Facts, paragraph 5, page 3).

The Agreed Statement of Facts recites that the insurance policies issued to Amercargo by the defendant covered, *inter alia* and subject to the exact terms and conditions of the policies, risks for personal injuries sustained by crew members in the course of their employment aboard the insured vessels as well as expenses, such as maintenance and cure, resulting from personal injuries. The policies provided as follows:

> "THE ASSOCIATION AGREES TO INDEMNIFY THE ASSURED AGAINST ANY LOSS, DAMAGE OR EXPENSE WHICH THE ASSURED SHALL BECOME LIABLE TO PAY AND SHALL PAY BY REASON OF THE FACT THAT THE ASSURED IS THE OWNER . . . OF THE INSURED VESSEL AND WHICH SHALL RESULT FROM THE FOLLOWING LIABILITIES, RISKS, EVENTS, OCCURRENCES AND EXPENDITURES: . . . ." (A.S.F., paragraph 13, p. 7).

In 1969 and 1970, Section 167(1) of the New York Insurance Law provided that no policy or contract insuring against liability for injury to person should be issued or delivered in New York unless it contained in substance certain provisions "which were equally or more favorable to the insured and to judgment cred-

itors so far as such provisions relate to judgment creditors." The first required provision was that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, would not release the insurer from the payment of damages for an injury sustained during the life of and within the coverage of such policy or contract. The second required provision was that an action could be maintained against the insurer, if a judgment against the insured, in an action to recover damages for injury sustained during the life of the policy, remained unsatisfied thirty days after service of notice of entry upon the insured's attorney. (Appendix H, infra).

In 1940 Section 167(4) was enacted, making the provisions of Section 167 inapplicable, *inter alia*, "to the kinds of insurances set forth in paragraph (c) of subsection two of section one hundred twelve." Section 112(2)(c) allows licensed insurance brokers to negotiate or to place contracts of marine insurance with insurers not authorized to do business in New York, "where it is reasonable so to do with due regard to the interests of all concerned . . ." Paragraph (c)(2) refers to "Insurance in connection with ocean going vessels against any of the risks specified in paragraph twenty-one of section forty-six." (Appendix H, infra).

Section 46 contains twenty-three definitions of the kinds of insurance authorized in New York. Section 46(21) defines "marine protection and indemnity insurance" as including insurance against liability of the insured for personal injury, illness or death. (Appendix H, infra).

The bill amending Section 167(4) was introduced at the request of the American Institute of Marine

Underwriters, whose counsel contended that New York marine insurance underwriters were at a competitive disadvantage with unauthorized insurers who, it was alleged, could not be compelled to comply with the provisions of Section 167(1), since their policies were prepared and executed outside of New York. The underwriters' counsel also asserted that the doctrine of liability *in rem* would afford adequate security to admiralty claimants of bankrupt insureds.

Counsel for the New York Insurance Department wrote a memorandum to the Governor, stating that the Department had no objection to favorable executive action, since it was felt that if admitted companies writing marine insurance were compelled to comply with the specific provision of Section 167, they would be at a disadvantage in competing with unauthorized companies.

Counsel to the Governor sent him a memorandum stating that he didn't understand the statement about the alleged competitive disadvantage, since none of the provisions required in Section 167 were of such a nature that they increased the cost of the policy. However, he stated that he had no objection to the bill, since "marine insurance is written for grownups who can read policies and discriminate between companies."

On January 26, 1978, the District Court entered a judgment in favor of the defendant, ruling that (a) the insurance policies were clearly policies of indemnification; (b) the law of New York was applicable under *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955); (c) under New York common law an insurer under an indemnity insurance

policy is not liable to an injured person who has obtained a judgment against an insolvent insured who cannot pay the judgment; (d) although Section 167, New York Insurance Law, changed this common law rule, such statutory change did not apply to marine insurance contracts in view of Section 167(4); and (e) the defendant was not liable to the plaintiffs under the indemnity insurance policies with Amercargo.

The District Court noted that although this result did seem harsh, it was mandated by both New York statutory and case law. Under the circumstances, the District Court stated that it was not free to inject its own notions of public policy. (Appendix A, infra). Judgment was entered against the plaintiffs on January 31, 1978, and they filed a Notice of Appeal on February 14, 1978.

On March 6, 1981, the Court of Appeals upheld the District Court's ruling that the insurance policies were policies of indemnification, and it held that although Section 167, New York Insurance Law, ordinarily applies to both indemnity and liability policies, the District Court was correct in ruling that Section 167(4), read in conjunction with Section 112(2)(c) and Section 46(21), precluded direct action suits based on marine protection and indemnity insurance. (Appendix C, infra).

The Court of Appeals then addressed plaintiffs' contention that because Section 167(4) exempted marine indemnification policies from direct actions, while allowing direct actions based on other types of indemnification policies, the statute violated the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Art. 1, § 11, of the

Constitution of New York. Although this argument had not been presented to the District Court, the Court of Appeals concluded that the significance of the issue and the possibility of injustice warranted a remand, limited solely to a consideration of the equal protection issue.

In reaching this conclusion, the Court of Appeals made reference to the revered canon of maritime jurisprudence that it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy, when not required to withhold it by established and inflexible rules. The Court of Appeals stated that the matter was not substantively governed by a federal admiralty rule and that *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955) had held state law to be applicable to the regulation of marine insurance contracts. Nevertheless, in accordance with admiralty's special solicitude for seamen, the Court of Appeals decided that plaintiffs should be given an opportunity to show that neither an established nor inflexible rule, consistent with constitutional principles, foreclosed them from obtaining satisfaction of their judgments from the defendant insurer. (Appendix C, infra).

Upon remand, the District Court, on January 28, 1982, granted the defendant's motion for summary judgment in an unreported Memorandum of Decision. (Appendix D, infra). Applying the minimal standard of review, the District Court concluded that the exemption of marine insurance from the provisions of Section 167, New York Insurance Law, did not constitute unlawful discrimination against the plaintiffs as merchant seamen. The court stated that the exemption did

not trammel any of plaintiffs' fundamental personal rights, nor was it drawn upon inherently "suspect" classifications, such as race, alienage or the like, within the meaning of such cases as *New Orleans v. Dukes*, 427 U.S. 297 (1976). The Court held that marine seamen, although favored by federal law for some purposes, have no more vested, fundamental or preferred right to bring a direct action against a marine insurer on a marine indemnity policy than any other marine tort plaintiff would have.

In its opinion, the District Court noted that the defendant had emphasized that the New York Legislature, in exempting maritime insurance from the direct action provision for other kinds of insurance, was expressly and primarily concerned with maintaining New York regulated maritime insurers on an equal, competitive basis with other maritime insurers which were not "jurisdictionally" subject to New York's requirement for placement of a direct action clause in their policies. The District Court stated that this particular consideration was held in *Miller v. American S.S. Owners Mut. Protection*, 509 F. Supp. 1047, 1049 (S.D.N.Y. 1981) to have been the rational basis on which the New York Legislature based its exceptive Section 167(4).

Judgment was entered against the plaintiffs on February 5, 1982 (Appendix E, infra), and the plaintiffs filed a Notice of Appeal on March 2, 1982.

On March 17, 1983, the Court of Appeals affirmed the judgment of the District Court in a brief opinion which merely incorporates, without detailed specifica-

tion, the reasons set forth in the District Court's unreported Memorandum of Decision. Noting that the District Court had found no basis for subjecting Section 167, New York Insurance Law, to strict scrutiny or any basis for subjecting the statute to an intermediate level of review (citing *Plyler v. Doe*, 102 S. Ct. 2382, 2395 (1982), the Court of Appeals stated that, it agreed, substantially for the reasons stated by the District Court, that New York did not deny equal protection when it granted plaintiffs in one class of lawsuits a right that it withheld from plaintiffs in another class of lawsuits. (Appendix F, infra).

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE EQUAL PROTECTION RIGHTS OF SEAMEN, PETITIONERS HEREIN, WILL BE VIOLATED IF THEY ARE PRECLUDED FROM ENFORCING UNSATISFIED JONES ACT JUDGMENTS BY THE APPLICATION OF A STATE LAW, (§ 167, NEW YORK INSURANCE LAW) WHICH, AS AMENDED, PURPORTS TO EXEMPT MARINE INSURERS FROM THE BASIC PROVISIONS OF THE STATUTE AUTHORIZING DIRECT ACTIONS AGAINST ALL LIABILITY AND INDEMNITY INSURERS FOR THE ENFORCEMENT OF UNSATISFIED JUDGMENTS AGAINST THEIR INSOLVENT INSUREDS.

This case involves important, and unsettled, questions of federal law relating to the enforcement of unsatisfied Jones Act judgments. Petitioners are seamen, citizens of various jurisdictions, who have been awarded damages in the Superior Court of the State of California for injuries sustained at various times on different vessels owned by their New York employers. During the period involved, the employers

were insured under policies of marine insurance issued by the defendant, a New York corporation. However, after petitioners' Jones Act causes of action had accrued, their employers became insolvent and petitioners' judgments were never satisfied.

Petitioners brought this action in the Superior Court of the State of California against defendant, and upon defendant's petition it was removed to the United States District Court on the ground of diversity of citizenship. The lower federal courts subsequently ruled that, under *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), the law of the State of New York applied, not only to the interpretation of the policy as one of indemnity, but also to the question of the right of petitioners to maintain a direct action against the defendant insurer. (Appendices A, C, infra).

In reaching the conclusion that petitioners had no such right, the District Court acknowledged that this result was harsh, but the court felt that it was a result mandated by New York law, which has long recognized the right of direct action against all liability and indemnity insurers, but which abolished that right as to marine insurers in 1940. The present case is the first one in which that change in the New York law was challenged.[1]

It is ironic that New York was one of the first states to recognize the necessity and justice of allowing direct

[1]Just five days after the first decision of the Court of Appeals in this case (Appendix C, infra.), the decision of a District Court in New York was filed in a second case involving the same defendant and the same statute. *Miller v. American Steamship Owners Mut. Protection and Indemnity Company*, 509 F.Supp. 1047 (S.D.N.Y. 1981).

actions against insurers for the purpose of enforcing unsatisfied judgments against insolvent insureds. Many years ago casualty insurers usually provided indemnity coverage, and under the old common law rules the insolvency of the insured would bestow a windfall on the insurer, since the injured person could not enforce his judgment directly against the insurance carrier because there was no "privity of contract." In 1909 New York enacted Section 109 of the New York Insurance Law, now Section 167, which gave an injured person a right of direct action against the insurer and prevented the insolvency of the insured from operating as a release of the insurer's responsibility. (Long, *Law of Liability Insurance*, § 1.08, pp. 1-21, 1-22; § 20.02, pp. 20-2, 20-3). The purpose of this law was to correct injustice and to eliminate the evil of a practice on the part of insurance companies to put their insureds through bankruptcy. (*Roth v. National Automobile Mut. Casualty Co.*, 202 App. Div. 667, 195 N.Y.S. 865, 867 (1922); *Merchants Mut. Automobile Liability Ins. Co. v. Smart*, 267 U.S. 126, 129-130 (1925), upholding the constitutionality of Section 109). The law was enacted for the protection of injured plaintiffs. (*Jackson v. Citizens Casualty Co.*, 277 N.Y. 385, 14 N.E. 2d 446, 447-448 (1938). In *Coleman v. New Amsterdam Casualty Co.*, 244 N.Y. 271, 160 N.E. 367, 369 (1928), Justice Cardozo stated:

> "The statute was prompted by a definite mischief. (Citations omitted). Before its enactment, the insolvency of the assured was equivalent in effect to a release of the surety. The policy was one of indemnity against loss suffered by the principal, and loss to him there was none if he was unable to pay. The effect of the statute is to give

> to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment has been satisfied."

In *Hansen v. Continental Ins. Co.*, 262 N.Y. 136, 186 N.E. 420, 421 (1933), Section 109 was held to be applicable in an action by a seaman on an unsatisfied Jones Act judgment. The New York Court pointed out that, by its terms, Section 109 applied to all policies of insurance against loss or damage resulting from an accident to or an injury suffered by an employee or other person for which the person insured was liable. The court stated:

> "That the traditional contract of marine insurance was one of indemnity for money actually paid or loss actually suffered, is no reason for exempting such policies from the operation of section 109, when the companies issuing marine insurance chose to insure against loss arising from personal injuries. The same considerations of fairness and public policy which originally led to the enactment of section 109 of the Insurance Law (cf. Vance on Insurance [2d Ed.], § 178; *Roth v. National Automobile Mutual Casualty Co.*, 202 App. Div. 667, 195 N.Y.S. 865), apply no less to the liability features of marine policies than to the policies originally contemplated by that section. To those considerations may be added the desirability of uniformity in that type of insurance. To standardize policies in that field was an essential object of the legislation."

Section 109 was enacted because New York recognized that even though an injured party was not privy to the insurance contract, he had a genuine interest in it and he should be enabled to invoke its protection. (*Lauritano v. American Fidelity Fire Insurance Co.*, 3

A.D. 2d 564, 162 N.Y.S. 2d 553, 556 (1957).) This section, and its successor, section 167, was prompted by the philosophy that having received the premiums, the insurance company should not be able to avoid liability to the injured person. In effect, to remedy an evil, the insurance proceeds became a trust fund for the benefit of injured persons. (*Matter of F.O. Baroff Co., Inc.*, 555 F. 2d 38, 41-42 (2d Cir. 1977).)

In 1940, New York enacted Section 167(4), which (as read in conjunction with sections 112(2)(c) and 46(21)), amended Section 167(1) by resurrecting the evil insofar as marine insurers are concerned. The alleged justification for this retrogressive law was, primarily, that because out-of-state marine insurers would not have to comply with the statutory requirements enacted to protect injured persons from injustice, New York marine insurers should be allowed to engage in the same unjust practice so that they could compete on an equally unfair basis. The Governor's counsel could not understand this contention of the marine underwriters who had sponsored the amendment, since the cost of marine insurance was not affected by the inclusion of the required provisions. In *Miller v. American S.S. Owners Mut. Protection, supra*, 509 F.Supp. 1047, 1050, the court stated that it was "speculative" whether the statutory change enabled New York marine insurers to make a higher profit.

It is clear that Section 167 was initially enacted to benefit injured members of the public. However, the subsequent immunity granted to marine insurers, for the speculative commercial advantage of this single class of insurers, is neither rationally nor reasonably

related to the original statutory objective. To permit marine insurers to revive an unjust and evil practice at the expense of tort victims of insolvent marine insureds constitutes an intolerable and unconstitutional discrimination which cannot be justified on any moral or legal ground. Any contention that the maritime doctrine of *in rem* liability provides adequate security for admiralty claimants is without substance, since the right of seamen to sue under the Jones Act is *in personam*, and a Jones Act suit cannot be brought in admiralty *in rem*. (2 Morris, *The Law of Seamen*, (3d ed., 1970), § 681, pp. 347-348). Nor is it logical to argue that since the amendment discriminates against all marine tort victims, seamen are not aggrieved. Seamen can only fight their own battles. Unlike other marine tort victims, seamen have been granted rights by Congress under the Jones Act, and those rights cannot be constitutionally infringed or limited by a state law which catches seamen in the same net as those not entitled to Jones Act rights.

It is fundamental that the Jones Act was meant to have a uniform application throughout the country, unaffected by local rules of law, and that rights arising from the Jones Act are to be implemented by admiralty principles, rather than by adverse common law rules, in view of the special solicitude afforded seamen in admiralty matters. (*Garrett v. Moore-McCormack Co*,. 317 U.S. 239, 243-248 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430-431 (1939).) Clearly, the right to obtain a Jones Act judgment is rendered barren and sterile, if the enforcement of that judgment may be frustrated by a state law exempting only marine insurers from the provisions of a statute which

allows direct actions against all other types of liability and indemnity insurers.

Although *Wilburn Boat Co. v. Fireman's Fund Ins. Co., supra,* 348 U.S. 310 (1955), allowed state law to control the question of the scope and validity of warranties in a marine insurance contract on a houseboat established in the waters of a small artificial inland lake, it cannot be reasonably construed as holding that state law governs in all cases involving marine insurance. (See, *Kossick v. United Fruit Co.,* 365 U.S. 731, 742 (1961).) State law must yield to the needs of a uniform and harmonious system of federal maritime law. (*Romero v. International Term. Operat. Co.,* 358 U.S. 354, 373 (1959).) Clearly, a state law which interferes unconstitutionally with rights arising under a federal law, such as the Jones Act, cannot be regarded as being within the scope of permissible State regulation.

In considering the equal protection issue in this case, the lower federal courts have been unduly deferential to New York law, apparently because they felt that, under *Wilburn Boat, supra,* the regulation of the marine insurance contract involved in this case had been fully entrusted to the state. Petitioners submit that this was not the intended effect of the *Wilburn* decision, as more fully discussed below, and that whatever the scope of *Wilburn Boat* may be, it does not require the application of an unconstitutional state law.

In evaluating the extent to which seamen are entitled to constitutional protection, the lower courts declined to apply the intermediate standard of review, as set forth in *Plyler v. Doe,* ..... U.S. ....., 72 L.Ed.2d 786, 799-800, 102 S.Ct. 2382, 2394-2395 (1982). New

York has also recognized that there is a middle-ground of constitutional review in equal protection cases. (*Alevy v. Downstate Medical Ctr.*, 39 N.Y.2d 326, 336-337, 384 N.Y.S.2d 82, 87, 89 1976).) In view of the strong Congressional policy underlying the implementation of Jones Act rights, together with the deep concern of admiralty for the welfare and protection of seamen, it is submitted that, at the very least, this is the standard of review to be applied. Assuming the applicability of New York law, the question is whether a substantial or compelling governmental interest of the state was validly served by its statutory classification favoring one type of liability and indemnity insurer, thereby denying to Jones Act judgment creditors the rights possessed by all non-maritime judgment creditors.

Petitioners submit that no valid governmental interest was served by allowing one class of insurers to revert to a practice which the state itself had found to be unjust and impermissible. It has never been shown to be true that New York insurers had any selfish commercial need to be allowed to offer marine insurance contracts which did not fully and fairly protect the interests of those members of the public who might be injured by insolvent insureds. Even if such a need can be regarded as a conjectural possibility, it is inconceivable that a state may constitutionally allow the infliction of an injustice upon one class of its citizens in order to confer a speculative commercial advantage upon those engaged in a business which so vitally affects the protection of the public. Certainly, a state cannot be allowed to allow such an injustice by discriminating against a class of persons which includes individuals entitled to substantial federal rights.

The standard of review applied by the District Court (Appendix D, infra), and approved by the Court of Appeals (Appendix F, infra), was that applied by this Court in *New Orleans v. Dukes*, 472 U.S. 297, 303-304. That case involved a claim by a pushcart vendor in New Orleans that a grandfather clause in a city ordinance prohibiting the selling of foodstuffs from pushcarts denied him equal protection of the law. In rejecting that claim it was held that when local economic regulation is challenged as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of statutory discriminations. Petitioners submit that no such deference is due a state law which affects the rights of seamen whose service in international waters has been deemed worthy of protection by both Congress and admiralty. The state law involved in this case is not merely "local economic regulation," and its adverse impact upon petitioners clearly denies them equal protection in an area of the law which is of national concern.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, IN ORDER TO EFFECTUATE THE INTENT OF CONGRESS THAT THERE BE UNIFORMITY AND HARMONY IN THE EXERCISE OF ADMIRALTY JURISDICTION OVER JONES ACT RIGHTS, GENERAL MARITIME LAW SHOULD GOVERN THE RIGHTS OF SEAMEN TO ENFORCE UNSATISFIED JONES ACT JUDGMENTS.

In *Wilburn Boat Co., supra,* this Court found no established admiralty rule requiring literal fulfillment of every marine insurance warranty, and the majority declined to fashion such a rule, stating that it would leave the regulation of marine insurance to the State. Justice Frankfurter, in his concurring opinion, made a distinction between those maritime matters that require uniformity in admiralty rules and policies and those which are so predominantly restricted in the range of their significance that a uniform admiralty rule need not be recognized or fashioned. Justice Frankfurter concluded that the interests concerned with shipping in its national and international aspects were substantially unconcerned with the rules of law to be applied to the essentially localized and limited situation involved in *Wilburn Boat.*

At the same time, Justice Frankfurter expressed his concern about the apparent breadth of the majority opinion, stating:

"Unfortunately, for reasons that I do not appreciate, the Court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in degree as to be different in kind come before this Court.

. . . .

"It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide maritime uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance." (*Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, *supra*, 348 U.S. 310, 323 (1955).)

This Court has fashioned a large part of the federal maritime law. In *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), it established the right to recover for wrongful death caused by the unseaworthiness of a vessel. In creating this remedy this Court refused to apply a state law which denied such a remedy and it declined to follow its own decision in *The Harrisburg*, 119 U.S. 199 (1886), wherein it was held that maritime law did not afford a cause of action for wrongful death. This Court pointed out the 1886 decision had been based on a common law rule which was no longer viable and which should not have been extended to admiralty, a system of law involving principles unknown to the common law, including a special solicitude for the welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages. Without deciding whether *The Harrisburg* was a correct extrapolation of the principles of decisional law then in existence, this Court held that, because the rule against recovery for wrongful death was sharply out

of keeping with the policies of modern American maritime law, the sense of its injustice had resulted in a wholesale abandonment of the rule in most of the areas in which it once held sway.

In *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), the question was whether a towboat may validly contract against all liability for its own negligent towage. It was decided, as a part of the judicially created admiralty law, that such a contractual provision was invalid as a violation of public policy.

Where state law enhances or supplements the remedies available for the vindication of maritime rights, it may be given effect in admiralty. (*Kossick v. United Fruit Co.*, 365 U.S. 371, 741-742 (1961).) But where state law serves to defeat maritime rights, it should not be given effect.

In the present case the lower federal courts interpreted *Wilburn Boat, supra*, as compelling the application of New York law. Understandably, these courts did not believe that they had the power either to disregard the apparently broad holding in *Wilburn Boat* or to adopt a rule of general maritime law in lieu of the New York law. Only this Court can decide these issues. Only this Court has the power to determine that, notwithstanding its decision in *Wilburn Boat*, the rights of the seamen in this case should be decided on the basis of general maritime law. Petitioners could not have called upon the lower federal courts to fashion the appropriate rule of maritime law, since that is solely the function of this Court.

Applying maritime law to the contract of marine insurance involved in this case, it is a reasonable con-

clusion that it was one of indemnity for liability, not of indemnity for loss. (See, *Orion Ins. Co., Ltd. v. Fireman's Ins. Co.*, 46 Cal. App. 3d 374, 120 Cal. Rptr. 222 (1975).) The overwhelming majority of American jurisdictions have adopted laws recognizing the right of injured persons to recover against insurers on unsatisfied judgments against their insureds. (See, *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 431-432 (1954), dissenting opinion of Justice Black). New York was in the vanguard in acknowledging the justice and necessity of such laws, and yet it is apparently the only state to withhold this essential right from those injured by marine insureds.

It is grossly unjust and illogical to make the right to enforce Jones Act judgments dependent upon the happenstance of the geographical location in which the particular marine insurance policies were issued to the shipowners. If the insurance contracts involved herein had been issued to Amercargo in California, petitioners would have no difficulty in realizing the financial benefits of their judgments. (See, *Williams v. Steamship Mut. Underwriting Assn.*, 45 Wash. 2d 209, 273 P. 2d 803 (1954), upholding the right of a seaman to enforce a Jones Act judgment, obtained in federal court, by a state court action against a California marine insurer). The fortuity that these contracts of insurance were issued in New York, a fact undoubtedly unknown to petitioners, ought not to deprive them of a remedy which should be uniformly available to all Jones Act judgment creditors.

Marine insurance is not a matter of purely local concern when it affects the right of seamen, who, as marine insurers know well, can join a ship in any port and

serve on board vessels sailing throughout the seas of the world. The issues involved in this case, important as they are to petitioners, significantly transcend their individual interests. For the indefinite future, New York's discriminatory legislation will continue to deprive seamen of fundamental federal rights unless this Court exercises its power to review the important questions of constitutional and maritime law presented by this petition. Only this Court can determine whether, in the light of its previous decisions, the anomalous New York law, if applicable at all, would operate to deny petitioners equal protection of the laws. Only this Court can determine whether the need for uniformity in the enforcement of Jones Act remedies in admiralty requires the application of general maritime law, so that the vagaries of state law will not destroy the harmony which is so vital in this area of admiralty jurisdiction.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

THE BOCCARDO LAW FIRM

JAMES F. BOCCARDO,
Counsel of Record

EDWARD J. NILAND,
Of Counsel

Attorneys for Petitioners.

(Appendices follow)

APPENDIX A

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, REPORTED IN 444 F.SUPP. 569, JANUARY 26, 1978.

FILED
JAN 26 1978
WILLIAM E. WHITTAKER, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALI GALEB AHMED, et al., *Plaintiffs,* vs. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., et al., *Defendants.*	No. C 75 0004 WTS MEMORANDUM OF DECISION

This action is presently before the court for a decision on the merits of the action, having been submitted for decision upon an agreed statement of facts (Docket No. 33) and upon written briefs (Docket Nos. 35, 37, 40).

Plaintiffs were merchant seamen who served on vessels owned by three companies – Amercargo, Inc., Amercargo Shipping Corp., and American Leader Inc.[1]

[1]These three companies will be referred to collectively as "Amercargo."

Plaintiffs filed actions in California state court against Amercargo for alleged personal injuries suffered while employed on Amercargo ships. Default judgments in favor of the plaintiffs were entered in those state actions but have never been satisfied due to the insolvency of Amercargo.

The present action was filed in state court in California and was subsequently removed to this court under 28 USC § 1441. In the present action the plaintiffs seek to recover from the defendant, the insurer for Amercargo, on the default judgments entered in state court against Amercargo.

Amercargo was at all relevant times a New York corporation with its principal place of business in New York. Defendant American Steamship Owners Mutual Protection and Indemnity Association ("the Association"), was at all relevant times, and still is, a New York corporation with its principal place of business in New York. The Association is a non-profit mutual insurance association whose members are shipowners who insure their vessels with the Association. The Association is managed by Shipowners Claims Bureau, a New York corporation with its principal place of business in New York.

The Association provides, *inter alia*, marine protection and indemnity insurance covering personal injury liability for its shipowner members who, to obtain insurance coverage, must become members of the Association.

The Association provided marine protection and indemnity insurance coverage for Amercargo vessels for parts of the years 1969 and 1970. The policies were

negotiated in New York and were signed and delivered in New York.

The policies provided as follows:

> "The Association agrees to indemnify the assured against any loss, damage or expense which the assured shall become liable to pay and shall pay by reason of the fact that the assured is the owner . . . of the insured vessel and which shall result from [personal injuries sustained by crew members in the course of their employment aboard the insured vessels]."

In order to receive reimbursement from the Association under the policy, the members must first actually pay the loss.

Plaintiffs seek by this action to recover directly from the Association, Amercargo's insurer, under the insurance policies—even though Amercargo has not yet actually paid any of the plaintiffs' claims against it.

There are in general two principal types of insurance for liability for personal injury to others. One is liability insurance, obligating an insurer to pay damages which the insured is legally liable to pay. The other is indemnity insurance, obligating the insurer to reimburse or indemnify the insured only to the extent that the insured himself has actually paid damages. *See, Stuyvesant Ins. Co. v. Nardelli,* 286 F. 2d 600 (5th Cir. 1961).

The chief distinction between the two types of insurance policies can be succinctly stated as follows:

> "The chief difference between a liability policy and an indemnity policy is that under the former a cause of action accrues when the liability attaches, while under the latter there is no cause of

> action until the liability has been discharged, as by payment of judgment by the insured. That is, under an indemnity policy, the insured must have suffered an actual money loss before the insurer is liable." 7 Appleman, *Insurance Law & Practice* § 4267 (1962) (footnote omitted).

The insurance policies herein are clearly policies of indemnification. *Cucurillo v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 1969 A.M.C. 2334 (Sup. Ct., New York County 1969) (involving an insurance policy of defendant with substantially the same language as herein); *see also, Liman v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd*, 417 F. 2d 627 (2d Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 936 (1970).

All parties agree that interpretation of the present maritime indemnity insurance contract is governed by state law for there is no well-settled applicable federal admiralty rule. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).[2]

Under *Wilburn* we must look to federal choice of law rules in determining which state law is to be applied. *Navagacion Goya, S.A. v. Mutual Boiler & Machinery Ins. Co.*, 1972 A.M.C. 650, 653 & n. 1 (S.D.N.Y. 1972); *see, Irwin v. Eagle Star Ins. Co.*, 455 F. 2d 827 (5th Cir.) *cert. denied*, 409 U.S. 852 (1972); *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F. 2d 1257 (5th Cir. 1976); *Liman, supra*, 299 F. Supp. at 108.

Under federal choice of law rules we must apply the law of the state with the most significant relation-

[2]Thus, we need not deal with the troublesome question of whether federal or local law should govern this maritime insurance contract. *See Kalmbach, Inc. v. Ins. Co. of Pennsylvania*, 529 F. 2d 552 (9th Cir. 1976).

ship to the insurance contract. *Navagacion Goya, S.A., supra,* 1972 A.M.C. at 653-54; *Restatement (Second) of Conflict of Laws* § 188. Here the insurance contracts were negotiated, issued and signed in New York. Amercargo and the Association are New York corporations with New York as their principal place of business. The contract was to be performed in New York in regard to the Association's duty to indemnify and reimburse Amercargo. Premiums and additional assessments, if necessary, for insurance coverage were payable in New York. Under all these circumstances New York law should be applied. See *Liman, supra,* 299 F. Supp. at 108.

Under New York common law, an insurer under an indemnity insurance policy is not liable to an injured person who has obtained a judgment against the insured—even though the insured is insolvent and cannot pay the judgment. *Burke v. London Guarantee & Accident Co.*, 47 Misc. 171, 93 N.Y.S. 652 (Sup. Ct., Kings County 1905), *aff'd without opinion,* 126 App. Div. 933, 110 N.Y.S. 1124 (Sup. Ct., App. Div. 1908), *aff'd without opinion,* 199 N.Y. 557, 93 N.E. 1117 (Ct. of App. 1910); *Meridan Trading Corp. v. National Automobile & Cas. Ins. Co.*, 45 Misc. 2d 847, 258 N.Y.S. 2d 16 (Sup. Ct., New York County 1964); *Cucurillo, supra,* 1969 A.M.C. at 2335-36; *see, Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F. 2d 500, 504 n. 5 (2d Cir. 1972).

However, New York has changed this common law rule by a statute which now permits a direct action by the injured person against the insurer. New York Ins. Law § 167. However, this statutory modification of the common law rule is of no benefit to plaintiffs, for the

statute is made expressly inapplicable to marine insurance contracts, §167(4); *Meridian Trading Corp., supra*, 258 N.Y.S. 2d at 18; *Cucurillo, supra*, 1969 A.M.C. at 2335-36; *Liman, supra*, 299 F. Supp. at 108 n. 1.

Plaintiffs contend that under New York law an injured person may directly recover from an insurer under a marine indemnity insurance policy when the insured is unable, because of insolvency, to pay a judgment against it in favor of the injured person, citing *Liman, supra.*

Plaintiffs' reliance on *Liman* is misplaced. *Liman* involved an action by an insolvent insured against the insurer,[3] seeking indemnity under the indemnity insurance policy. It was not an action by an injured person against the insurer seeking to recover on an unsatisfied judgment against the insured – as is the case herein. Secondly, in *Liman* the court construed the financial arrangements made between the insolvent insured and the injured persons (who had obtained judgments against the insured), through which the insured was to pay the injured person, as being in effect an actual payment by the insured, thus entitling the insured to indemnification and reimbursement from the insurer. *See, also, Seaboard Shipping Corp., supra*, 461 F. 2d at 504 n. 5. Finally, the court in *Liman* distinguished the situation in *Liman* from that presented here, where the insured has never paid any of the claims against it or arranged to finance such payments. 299 F. Supp. at 110.

[3]The defendant in *Liman* was the same defendant as in the present case.

Indeed, the New York case most closely in point is *Cucurillo, supra,* involving the same type of insurance policy and the same defendant as herein. In *Cucurillo* the plaintiff had obtained a judgment against the insured, then brought a direct action against the insurer under the indemnity policy to recover on the judgment against the insured. The court, reviewing the relevant statutory and case law of New York, held that an insured is not directly liable to a judgment creditor of an insolvent insured under an indemnity insurance contract and dismissed the action.

Accordingly, applying New York law as most recently found in *Cucurillo,* the defendant Association is not liable to the plaintiffs herein under the defendant's indemnity insurance policies with Amercargo. Therefore, judgment will be entered in defendants' favor in this action.

We note that the result herein does seem harsh. However, it is clear that we should apply New York law under the facts of this case, and that both New York statutory and case law mandate the result herein. Under these circumstances this court is not free to inject its own motions of public policy.

Dated: January 26th, 1978.

W. T. SWEIGERT
United States District Judge

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED JANUARY 26, 1978.

FILED
JAN 26 1978
WILLIAM E. WHITTAKER, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALI GALEB AHMED, et al., *Plaintiffs,* vs. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., et al., *Defendants.*	No. C 75 0004 WTS JUDGMENT (Rule 58, F.R.Civ.P.)

This action came on before the Court, the Honorable William T. Sweigert, District Judge, presiding, and the issues having been duly tried upon an agreed statement of facts and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that each party bear their own costs of action.

Date: January 26th, 1978.

W. T. SWEIGERT
United States District Judge

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, REPORTED IN 640 F.2d 993, MARCH 6, 1981.

Ali Galeb AHMED et al.,
Plaintiffs-Appellants,
v.
AMERICAN STEAMSHIP MUTUAL PROTECTION & INDEMNITY ASSOCIATION et al., Defendant-Appellee.

No. 78-1368.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted April 17, 1980.
Decided March 6, 1981.

Appeal from the United States District Court for the Northern District of California.

Before HUG, SCHROEDER, and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

Appellants are twenty-six seamen who, after obtaining default judgments against their employer shipping companies for damages for personal injuries, directly sued appellee, the insurance carrier for all the employers. The district court granted summary judgment in favor of the defendant carrier on the ground that New York Insurance Law § 167(4) precludes appel-

lants' direct action suit against the insurer. We affirm in part and remand in part.

Plaintiffs-appellants are injured merchant seamen who served on vessels owned by three companies, collectively referred to as Amercargo. Defendant-appellee, American Steamship Owners Mutual Protection & Indemnity Association, is a non-profit mutual insurance association engaged in the business of providing marine protection and indemnity insurance to member shipowners. Appellee insurance carrier insured Amercargo during 1969 and 1970 against risks of loss for personal injuries sustained by crew members in the course of their employment aboard Amercargo's vessels. Each of the appellants sustained personal injuries while working for Amercargo during the years covered by the policies.

Appellants filed suit against Amercargo in the San Francisco Superior Court to recover damages for personal injuries. Under the terms of the insurance contract, Amercargo handled the defense of the suit. Appellee insurance carrier retained the right to supervise the litigation but declined to exercise that right. In 1973, a default judgment was entered in favor of each appellant and against Amercargo.

Appellants were unable to satisfy their judgments because of Amercargo's intervening insolvency. In 1973, appellants submitted their unsatisfied judgments as creditors' claims in Amercargo's bankruptcy proceedings in the United States District Court for the Southern District of New York. None of the judgments were satisfied. The judgments amounted to $577,015.54; Amercargo's policy had a deductible of $190,000.00.

Appellants then commenced this direct action suit in the United States District Court for the Northern District of California against appellee, Amercargo's insurer. On an agreed statement of facts, the district court held that: (1) New York law applied to this action; (2) the insurance policies were indemnification rather than liability policies; and (3) New York Insurance Law § 167(4), which authorizes direct action suits against insurers by injured third parties, nevertheless precludes direct action suits based on marine indemnity insurance contracts. Accordingly, the court granted summary judgment in favor of the insurance carrier. *Ali Galeb Ahmed v. American Steamship Mutual Protection & Indemnity Association*, 444 F. Supp. 569 (N.D. Cal. 1978). This appeal followed.[1]

Appellants' first contention is that the district court erred in concluding that the insurance policy at issue is a policy of indemnification rather than one of liability. The relevant clause of the insurance policy reads as follows:

> The Association agrees to indemnify the assured against any loss, damage or expense which the assured shall become liable to pay and shall pay by reason of the fact that the assured is the owner . . . of the insured vessel and which shall result from the following liabilities, risks, events, occurrences and expenditures . . . .

Relying on *Liman v. American Steamship Owners Mutual Protection and Indemnity Association*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd* 417 F. 2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S. Ct. 946,

[1]Appellants do not appeal the district court's ruling that New York law governs this diversity action.

25 L.Ed.2d 116 (1970), and *Cucurillo v. American Steamship Owners Mutual Protection and Indemnity Association*, 1969 A.M.C. 2334 (Sup. Ct. 1969), the district court found that the insurance policies are policies of indemnification, i.e., policies under which the insurer's obligation to pay does not arise until after the insured suffers an actual monetary loss.

Although Judge Sweigert was not bound by the *Cucurillo* and *Liman* holdings[2] his reliance upon them was well-founded as *Cucurillo* accurately set forth a summary of relevant New York law. Moreover, *Cucurillo* and *Liman* dealt with policies identical to the policy at issue here.[3] Thus the district court was correct in ruling that the policies are indemnification policies.

Appellants' second contention is that the district court erred in concluding that New York Insurance Law § 167(4) bars appellants' direct action suit against the insurer.

---

[2]In applying New York law, we follow, as did the district court, the guidelines established by the Supreme Court:

> [T]he State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782, 18 L.Ed.2d 886 (1967), *quoting Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956).

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[3]We decline to accept appellants' invitation to hold, on the authority of *Orion Insurance Co. v. Firemen's Insurance Co.*, 46 Cal. App. 3d 374, 120 Cal. Rptr. 222 (1975), *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F. 2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S. Ct. 1120, 25 L.Ed.2d 396 (1970), and *Coleman v. Jahncke Service, Inc.*, 341 F. 2d 956 (5th Cir. 1965), that this policy is one of liability. *Liman* and *Cucurillo* interpret the law of New York, and, therefore, provide reliable guidance.

The district court opinion succinctly discusses New York law with respect to direct action suits and we need not repeat that discussion. *See* 444 F. Supp. at 572. Although section 167 permits injured parties to assert their unsatisfied claims directly against insurance carriers of insolvent insureds, that section does not apply to all types of insurance policies. Section 167 does apply to both indemnity and liability policies, *175 East 74th Corp. v. Hartford Accident & Indemnity Co.*, 72 A.D. 2d 521, 420 N.Y.S. 2d 902 (App. Div. 1979), but section 167(4), read in conjunction with sections 112(2)(c) and 46(21), precludes direct actions suits based on marine protection and indemnity insurance. *See* N.Y. Ins. Law §§ 167(4), 112(2)(c), and 46(21).[4]

Judge Sweigert found appellees' marine protection and indemnity policy clearly within the ambit of section 167(4) and therefore exempt from the direct action statute. We agree.

Appellants' final contention is that because section 167(4) exempts marine indemnification policies from direct actions, but allows direct actions based on other

[4]Section 167(4) reads as follows:

> The provisions of this section shall not apply . . . to the kinds of insurance set forth in paragraph (c) of subsection two of section one hundred twelve.

Section 112(2)(c) provides:

> (c) marine insurance of the following kind or kinds . . . :
>
> (1) insurance against perils of navigation . . . ;
>
> (2) insurance in connection with ocean going vessels against any of the risks specified in paragraph 21 of section 46.

Section 46(21) provides:

> "marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

types of indemnification policies, the statute violates the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Art. 1, § 11 of the Constitution of New York. According to appellants, this disparate treatment bears no rational relationship to the purpose of the direct action statute which is to extend the benefits of insurance coverage to injured parties when an insolvent insured cannot satisfy a judgment.

This equal protection argument was not presented to the trial court nor was evidence introduced that could support findings by the trial court on the issue. Ordinarily we decline to consider an issue not raised below. That rule, however, is not a "jurisdictional limitation, but merely . . . a rule of practice." *Krause v. Sacramento Inn*, 479 F.2d 988, 989 (9th Cir. 1973). "Relaxation of this rule is sometimes appropriate in appeals wherein there are significant questions of general impact or when injustice might otherwise result." *Id.* Here, though we might be inclined to consider the equal protection issue, we are precluded from doing so by the absence of an appropriate factual record. This being the case, remand for findings of fact and for further development of the legal arguments is permissible. *Cf. United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (in light of recent change in the law, remand for further findings of fact may be required to develop arguments).

We believe such a remand, limited solely to consideration of appellants' equal protection argument, is appropriate here. It is a revered canon of maritime jurisprudence that "it better becomes the humane and liberal character of proceedings in admiralty to give

than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Moragne v. States Marine Lines*, 398 U.S. 375, 387, 90 S. Ct. 1772, 1780, 26 L. Ed. 2d 339 (1970), *quoting with approval, The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (C.C. Md. 1865). *Accord, American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980). Moreover, "[a]dmiralty jurisprudence has always been inspirited with a 'special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages.' " *American Export Lines, Inc. v. Alvez*, 446 U.S. at 284, 100 S. Ct. at 1679, *quoting Moragne v. State Marine Lines*, 398 U.S. at 387, 90 S. Ct. at 1780. We recognize that this matter is not substantively governed by a federal admiralty rule, and that state law therefore applies to the regulation of marine insurance indemnity contracts. *See Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).[5] Nevertheless, although state laws applies substantively, we cannot forget our obligation to treat merchant seamen with a "special solicitude." Accordingly, we allow

[5]It appears that section 167(4) may have been enacted because of uncertainty concerning the applicability of state direct action statutes to maritime law. See *Liman v. American Steamship Owners Mutual Protection and Indemnity Association*, 299 F. Supp. 106, 109 n. 1 (S.D.N.Y.) *aff'd* 417 F. 2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S. Ct. 946, 25 L. Ed. 2d 116 (1970). Whether that uncertainty prompted the enactment of the exception, and if so, whether that uncertainty is still a valid basis for the exception could be relevant in analyzing the equal protection issue. Subsequent to the enactment of section 167(4), the Supreme Court held that state law applies to the interpretation of marine insurance contracts. See *Wilburn Boat Co. v. Fireman's Fund Insurance Co., supra.* Thus one might conclude that earlier uncertainty over the applicability of state law to maritime cases would not now provide a rational basis for the exemption of maritime indemnity policies from direct action suits.

appellants an opportunity to develop their arguments and to show that neither an established nor inflexible rule, consistent with constitutional principles, forecloses them from obtaining satisfacation of their judgments from appellee insurance carrier. We therefore affirm the district court on the substantive issues raised below and remand for further proceedings on the equal protection issue consistent with this question.

AFFIRMED IN PART AND REMANDED IN PART.

APPENDIX D

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED JANUARY 28, 1982.

FILED
Jan 28 12:00 PM '82
WILLIAM E. WHITTAKER
Clerk
U.S. DISTRICT COURT
NO. DIST. OF CA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALI GALEB AHMED, et al., *Plaintiffs,* vs. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., et al., *Defendants.*	No. C 75 0004 WTS MEMORANDUM OF DECISION

This present proceeding in this case arises from a decision of our Ninth Circuit Court of Appeals, rendered March 6, 1981, which, although affirming a previous January 26, 1978 decision of this court, remanded the case for further proceedings on a constitutionality issue—notwithstanding that that issue had not been previously presented to this court nor had any factual record ever been presented on the issue.

Accordingly, this court has allowed the parties to present a factual record on and fully brief the issue

which is now presented on plaintiffs' motion for summary judgment in its favor and defendant's cross-summary judgment motion.

The evidentiary record on this constitutional issue consists of plaintiffs' Exhibits A, B, C and D, filed August 14, 1981, and defendant's Exhibits A, B, C, D and E filed September 4, 1981. Briefing was completed September 18, 1981 and the motions submitted.

The above action was originally brought by several merchant seamen who had served aboard and had been personally injured aboard ships owned by Amercargo, against American Steamship Owners Mutual Protection and Indemnity Association, a non-profit mutual insurance association composed of shipowners, among them Amercargo, who insured their ships with the Association under personal injury liability policies obligating the insurer to indemnify the insureds to the extent that the insureds had actually paid damages.

Plaintiffs alleged that they had obtained default judgments for their personal injuries against Amercargo which judgments, however, had never been satisfied due to the insolvency of Amercargo.

This court held that under New York common law an insurer was not liable under an indemnity insurance policy in a direct action brought by an injured plaintiff even when the plaintiff had obtained a judgment against the insured which the insured could not pay due to its insolvency.

This court noted, however, that the New York Legislature had changed this common law rule by enacting Section 167 of its Insurance Law; that section required certain contracts or policies of insurance to include

certain "standard provisions," including a requirement that each regulated policy issued or delivered in New York must contain a provision stating that the insolvency of the insured will not release the insurer from liability and a provision for a right of direct action against the insurer in the event that a judgment against the insured remains unsatisfied.

This court held, however, that the statutory change could not benefit plaintiffs because one of its provisions (Sec. 167(4)) expressly made the change inapplicable to marine insurance contracts.

It is the constitutionality of this exceptive provision of the New York statute that has been put in issue before the court.

Plaintiffs further contend that the exceptive classification of Section 167(4) is such that its constitutional validity should be tested, not by the general traditional test of rational relationship to a legitimate legislative purpose, but by certain "heightened standards of review"; e.g., the "strict scrutiny" test or, at least, by the "sharp focus" test, requiring an important, compelling state interest to uphold the classifications, citing such cases as *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Alevy v. Downstate Medical Ctr.*, 39 N.Y. 2d 326, 384 N.Y.S. 2d 82 (1976)—all involving "suspect" classifications, infringement of fundamental rights or, as in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), situations which, although not technically suspect, bear sufficient similarity to warrant heightened scrutiny.

Plaintiffs contend that the purpose of the New York statute, Section 167, was to liberalize the state's former common law rule by extending the provision of insurance policies to injured tort victims by prohibiting insurance companies from using the bankruptcy of an insured as a defense to direct third-party actions —including actions on indemnity policies; that the exceptive provision of the statute, exempting maritime insurance from the general liberalizing provisions of Section 167, discriminates against a class such as plaintiffs here—merchant marine seamen—and favors certain insurance companies, such as the Association here, and is an arbitrary, unconstitutional denial of the equal protection provisions of both the New York State and United States Constitutions.

Defendant contends that Section 167(4) is not an unconstitutional discrimination against merchant seamen nor a favoring of certain kinds of insurance issuers; e.g., the defendant Association here, as against non-maritime insurers—even if plaintiffs had standing to raise the latter issue; that the exceptive provision, Section 167(4) is merely part of New York State's overall regulation of insurance companies and insurance policies—a legitimate state interest.

Defendant also contends that the standard for review of such a statutory provision is such that the provision cannot be invalidated unless it violates the general, traditional standard for review of legislative classifications, i.e., unless it is wholly arbitrary and without rational relationship to a legitimate state interest, citing such cases as *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489-493 (1977); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-

317 (1976); *New Orleans v. Dukes*, 427 U.S. 297, 303-306 (1976); that it should not be subject to any "heightened" standard of review, such as the strict scrutiny or "sharp focus"—compelling state interest requirement of such cases as *Michael M. v. Superior Court of Sonoma County, supra*, 450 U.S. 464; *Reed v. Reed* 404 U.S. 71 (1971); *Shapiro v. Thompson, supra*, 394 U.S. 618; *Loving v. Virginia*, 388 U.S. 1 (1967), and *Alevy v. Downstate Medical Ctr., supra*, 384 N.Y.S. 2d 82.

So fas as rational relationship to the legitimate state interest of insurance regulation is concerned, defendant contends that there are many reasons for the exemption of marine insurance.

It need not be shown what the reasons of the New York Legislature actually were if any state of facts reasonably may be conceived to justify the statute. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Defendant suggests the Leglislature may have been concerned, at the time the statute was enacted, about the state's power to regulate maritime insurance and desirous of avoiding a challenge to the statute on that ground (even though it was subsequently held that a state had such power). (*See Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310 (1955)).

Defendant also suggests that the New York Legislature could have concluded that, since maritime law gives *in rem* rights against a ship, this added benefit should distinguish maritime claimants from non-maritime claimants who generally do not have such an *in rem* right. The New York Legislature may have been concerned, defendants also suggests, with the difference between maritime policies and other kinds of in-

surance in that maritime policies are insured typically by non-profit marine insurance associations composed of shipowner members from whom assessments are collected, based on the loss experience of all members, and that imposition of an insolvent member's liability on other members would unduly burden such maritime insurance associations.

Defendant emphasizes, however, that the New York Legislature, in excepting maritime insurance from the direct action provision for other kinds of insurance, was expressly and primarily concerned with maintaining New York regulated maritime insurers on an equal, competitive basis with other insurers who write maritime insurance, but are not jurisdictionally subject to New York's requirement for placement of a direct action clause in their policies.

This particular consideration has been held in *Miller v. American S.S. Owners Mut. Protection*, 509 F. Supp. 1047, 1049 (S.D.N.Y. 1981), (involving the precise factual and legal issues now before us) to have been the rational basis on which the New York Legislature actually based its exceptive Section 167(4) as shown by the provision's legislative history (quoted in *Miller*, at 1049, n. 2).

Plaintiff argues that, if this was the purpose of the New York Legislature, the proper rational way to accomplish it would have simply been for the lawmakers to prohibit insurance brokers from placing insurance with insurance carriers unauthorized by New York. However, it must be borne in mind that the general, traditional test on judicial review is that the legislative determination cannot be invalidated merely be-

cause it appears to have been unwise or unfair or that, as plaintiffs suggest, its purpose could have been achieved in some other better way. *New Orleans v. Dukes, supra,* 427 U.S. at 303-04.

Considering the exceptive provision of Section 167(4) in the light of these well-established principles laid down by the U.S. Supreme Court and in the light of such evidentiary material as is before us in this case, and also in the light of plaintiffs' burden of proof, we find and conclude that the exemption of maritime insurance by the New York Legislature from Section 167 of that State's insurance code does not constitute unlawful discrimination against the plaintiffs as merchant seamen.

In the first place, the exceptive provision precludes, not only merchant seamen, but also other kinds of marine tort plaintiffs who might otherwise have had the benefits of the direct action provision.

The provision does not trammel any of plaintiffs' fundamental personal rights nor is it drawn upon inherently "suspect" distinctions, such as race, alienage, or the like, within the meaning of such cases as *New Orleans v. Dukes, supra,* 427 U.S. at 303-06.

Merchant seamen, as such, although favored by federal law for some purposes, have no more vested, fundamental or preferred right to bring a direct action against a marine insurer on a marine indemnity policy than any other marine tort plaintiff would have.

We are satisfied that on the record here this court should not sit as a superlegislature to judge the wisdom

or desirability of legislative policy determinations in areas that neither affect fundamental rights nor proceed along suspect lines. *New Orleans v. Dukes, supra,* 427 U.S. at 303-06.

Defendant's motion for summary judgment on the constitutional issue is granted; plaintiffs' motion for summary judgment is denied.

Dated: January 27, 1982.

W. T. SWEIGERT
United States District Judge

APPENDIX E

JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, ENTERED FEBRUARY 5, 1982.

FILED
Feb 4 3:29 PM '82
WILLIAM E. WHITTAKER
Clerk
U.S. DISTRICT COURT
NO. DIST. OF CA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALI GALEB AHMED, et al., *Plaintiffs,* v. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., et al., *Defendants.*	No. C-75-0004 WTS JUDGMENT

Entered into Civil Docket 2-5-82.

The Court having entered an order granting the motion of defendant American Steamship Owners Mutual Protection and Indemnity Association, Inc. for summary judgment in its favor and denying plaintiffs' motion for summary judgment in their favor,

It is hereby ORDERED, ADJUDGED AND DECREED:

1. That the Complaint against the defendant and each cause of action asserted by it be and hereby are dismissed with prejudice; and

2. That defendant receive its costs of suit.

Dated: February 2, 1982.

W. T. SWEIGERT
United States District Judge

APPENDIX F

OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, REPORTED IN 701 F.2d 824, MARCH 17, 1983.

FILED
MARCH 17 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALI GALEB AHMED; ALI M. ALBAKRI; MUHAMMED ALI ALHADI; ROGER N. BAKER; EDWARD T. BARTH; ARTURO CINTRON; JULIAN DEVEAUX, et al., *Appellants,* v. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., et al., *Appellees.*	No. 82-4116 DC No. C-75-004 WTS OPINION

Appeal from the United States District Court
for the Northern District of California
William T. Sweigert, District Judge, Presiding
Argued and submitted February 17, 1983

Before: GOODWIN, TANG and FARRIS, Circuit Judges

PER CURIAM

This cause was remanded to the district court on the narrow question of the constitutionality of § 167(4)[1] of the New York Insurance Law. *Ahmed v. AM. S.S. Mut. Protection & Indem. Ass'n*, 640 F. 2d 993 (9th Cir. 1981). The district court declined to declare the statute unconstitutional and the plaintiffs appeal again to this court. We affirm.

The plaintiffs' theory is that the state's exemption of marine insurance carriers from the direct-action provision of 27 New York Insurance Law § 167(1)(a)[2] unconstitutionally discriminates against injured seamen. The plaintiffs argue that because other tort victims have a direct action against the insurance carrier when the tortfeasor is insolvent, the exemption of marine insurance carriers from direct-action liability denies injured seamen equal protection of the law.

The district court found no basis for subjecting the statute to strict scrutiny and adequately distinguished the exemption from those statutes which have been declared invalid because they create invidious discrimination against disfavored classes.

The district court also failed to find any basis for subjecting the statute to an intermediate level of review. See, e.g., *Plyler v. Doe*, 102 S.Ct. 2383, 2395 (1982). Substantially for the reasons stated by the district court,[3] we agree that the state did not deny equal protection when it granted plaintiffs in one class of lawsuits a right that it withheld from plaintiffs in another class of lawsuits.

Affirmed.

A TRUE COPY
ATTEST APR - 8 1983
PHILLIP B. WINBERRY
Clerk of Court
by: SIGNA ZELEBE, Deputy Clerk

FOOTNOTES

Ahmed, et al. v. American Steamship Owners Mutual Protection and Indemnity Association, Inc., et al. No. 82-4116

[1]Section 167(4) reads as follows:

"The provisions of this section shall not apply . . . to the kinds of insurance set forth in paragraph (c) of subsection two of section one hundred twelve."

Section 112(2) (c) provides:

"Notwithstanding the provisions of subsection one any licensed insurance broker may negotiate a contract of insurance, or place insurance, in an insurer not authorized to do business in this state, as follows:

. . . . . .

"(c) marine insurance of the following kind or kinds:

. . .

(1) insurance against perils of navigation . . . ;

(2) insurance in connection with ocean going vessels against any of the risks specified in paragraph twenty-one of section forty-six."

Section 46 provides in part:

"The kinds of insurance which may be authorized in this . . . are set forth in the following paragraphs . . . .

. . . . . .

"21. 'Marine protection and indemnity insurance' meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person."

[2]Section 167(1) (a) provides:

"No policy or contract insuring against liability for injury to person, except as stated in subsection three, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions [sic] or provisions which are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:

"(a) A provision that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract."

[3]U.S. Dist. Ct. for N. Dist. of Calif., Memorandum No. C 75 0004 WTS (Jan. 28, 1982).

APPENDIX G

JUDGMENT OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, FILED AND ENTERED MARCH 17, 1983.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALI GALEB AHMED; ALI M. ALBAKRI; MUHAMMED ALI ALHADI; ROGER N. BAKER; EDWARD T. BARTH; ARTURO CINTRON; JULIAN DEVEAUX, et al., *Appellants,* v. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., et al., *Appellees.*	No. 82-4116 DC: CV-75-0004-WTS

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered March 17, 1983.

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

CONSTITUTIONS AND STATUTES INVOLVED:

UNITED STATES CONSTITUTION, ARTICLE III, Section 2, Clause 1:

Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

Citizenship; privileges and immunities; due process; equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK CONSTITUTION, ARTICLE 1, Section 11:

Equal protection of laws; discrimination in civil rights prohibited.

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

NEW YORK INSURANCE LAW, Section 46:

Kinds of insurance authorized.

The kinds of insurance which may be authorized in this state, subject to the other provisions of this chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits

resulting therefrom; but no kind of insurance shall be deemed to include life insurance, title insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this chapter, any insurer authorized to do business in this state may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein;

. . . . . .

21. "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

. . . . . .

NEW YORK INSURANCE LAW, Section 112:

Acting for or aiding unlicensed or unauthorized insurers.

1. No person, firm, association or corporation shall in this state act as agent for any insurer which is not licensed or authorized to do any insurance business in this state, in the doing of any business of insurance in this state or in soliciting, negotiating

or effectuating any insurance or annuity contract or shall in this state act as insurance broker in soliciting, negotiating or in any way effectuating any insurance or annuity contract of, or in placing risks with, any such insurer, or shall in this state in any way or manner aid any such insurer in effecting any insurance or annuity contract.

2. Notwithstanding the provisions of subsection one any licensed insurance broker may negotiate a contract of insurance, or place insurance, in an insurer not authorized to do business in this state, as follows:

(a) a contract of reinsurance.

(b) insurance against loss of or damage to property having a permanent situs outside of this state.

(c) marine insurance of the following kind or kinds, where it is reasonable so to do with due regard to the interests of all concerned and whether or not, at the time of such negotiation, the subject matter of such insurance is within or without this state:

(1) Insurance against perils of navigation, transit or transportation upon hulls, freights or disbursements, or other shipowner interests, goods, wares, merchandise and all other personal property and interests therein, in course of exportation from or importation into any country, or transportation coast-wise, including transportation by land or water from point of

origin to final destination and including war risks and marine builders' risk; and

(2) Insurance in connection with ocean going vessels against any of the risks specified in paragraph twenty-one of section forty-six.

. . . . . .

NEW YORK INSURANCE LAW, Section 167:

Liability insurance; standard provisions; right of injured person.

1. No policy or contract insuring against liability for injury to person, except as stated in subsection three, or against liability for injury to, or destruction, property shall be issued or delivered in this state, unless it contains in substance the following provisions which are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:

(a) A provision that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract.

(b) A provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract, shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment

upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

(c) A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer.

(d) A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured or by any other claimant thereunder if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

. . . . . .

3. No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy.

4. The provisions of this section shall not apply to any policy or contract of insurance in so far as it covers

the liability of an employer for workmen's compensation, if such contract is governed by the provisions of section fifty-four of the workmen's compensation law, or by any similar law of another state, province or country, nor to the kinds of insurances set forth in paragraph (c) of subsection two of section one hundred twelve.

. . . . . .

46 U.S.C. § 688, Recovery for injury to or death of seaman:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

DATED: June, 1983

Office - Supreme Court, U.S.
FILED
JUL 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALI GALEB AHMED, *et al.*,
Petitioners, Plaintiffs,

VS.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION, INC., *et al.*,
Respondents, Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 82-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALI GALEB AHMED, *et al.*,
Petitioners, Plaintiffs,

VS.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION, INC., *et al.*,
Respondents, Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Plaintiffs are twenty-six seamen who obtained default judgments against their employers. Those judgments were not satisfied due to the employers' insolvency, and plaintiffs brought an action in state court against the employers' insurer, American Steamship Owners Mutual Protection and Indemnity Association (the "American Club"). The action was removed to the Northern District of California on diversity grounds and was tried to the court on an agreed statement of facts. (CR 33)[1]

[1] In accordance with the Ninth Circuit practice, the citations to the Clerk's Record ("CR") are to the docket number of the cited document.

In the district court plaintiffs contended that "STATE LAW GOVERNS QUESTIONS INVOLVING MARINE INSURANCE" (CR 35, p. 3), and they argued that state law entitled them to bring a direct action against their employers' insurer. The district court explicitly relied on the parties' agreement that state law governed and ruled that the applicable law was that of New York. (App. A, pp. A-4, A-5; 444 F. Supp. at 571-72)

The district court found that the insurance policies were ones of indemnification, not liability, and that New York law provided that an insurer under such a policy is not directly liable to an injured person even though the insured is insolvent and cannot pay the judgment. (App. A, pp. A-3, A-4, A-5; 444 F. Supp. at 571-72) The district court also held that although New York had enacted a general direct action statute, that "statutory modification of the common law rule is of no benefit to plaintiffs, for the statute is made expressly inapplicable to marine insurance contracts . . . . " (App. A, pp. A-5, A-6; 444 F.Supp. at 572) The district court therefore entered judgment for the American Club. (App. A; 444 F.Supp. 569)

Plaintiffs appealed, but they "[did] not appeal the district court's ruling that New York law governs this diversity action". (App. C, p. C-3 n.1; 640 F.2d at 995 n.1) The Ninth Circuit affirmed the district court's interpretation of the insurance contracts and its application of New York law but remanded to allow plaintiffs to raise an issue not presented below—that Section 167(4)'s exemption of "marine protection and indemnity insurance" from the statutory direct action requirement denied equal protection of the laws. (App. C, pp. C-5, C-6; 640 F.2d at 995-96)

On remand, the district court rejected plaintiffs' contention that seamen were a "suspect" class, ruled that it "should not sit as a superlegislature", and upheld the statute. (App. D, pp. D-7, D-8) The Ninth Circuit affirmed in a per curiam opinion. (App. F; 701 F.2d 824)

REASONS FOR DENYING THE WRIT

Plaintiffs' Petition fails to show any "special and important reasons" to grant the writ. (Rule 17.1) Thus nowhere does the

Petition demonstrate that the decision below conflicts with a decision of another circuit court or of a state court of last resort, or that it conflicts with applicable decisions of this Court, or that it decided an important question of federal law which has not been, but should be, settled by this Court. That, by itself, is a sufficient basis for denying the writ. We nevertheless turn to plaintiffs' purported grounds for granting the writ and show them to be without merit.

I.

THE PURPORTED EQUAL PROTECTION ISSUE IS NOT WORTHY OF REVIEW BY THIS COURT.

The Petition is unclear as to just what issues it asks this Court to address respecting the fourteenth amendment's equal protection clause.[2] Apparently plaintiffs are dissatisfied because the lower courts did not subject New York Insurance Law Section 167(4) to heightened judicial scrutiny (Pet., pp. 19-21) and because the lower courts found that the statute was rationally related to a legitimate state purpose. (Pet., pp. 17-18, 20-21) None of plaintiffs' arguments raise issues appropriate for review by this Court.

A. No Important Issue Exists As To The Standard Which Was Applied.

Traditionally, equal protection analysis has been based on two different standards of review. Statutes which make classifications based on inherently suspect criteria, such as race, or which infringe fundamental rights, are subject to strict scrutiny. See, *e.g., Loving* v. *Virginia,* 388 U.S. 1 (1967); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). In such cases, the court asks whether the statute serves a compelling state interest. *E.g., Shapiro* v. *Thompson, supra,* 394 U.S. 618, 634.

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[2] The first question presented purports to raise an issue under Article 1, § 11 of the New York Constitution, but plaintiffs offer no reason why this Court should consider that state law question. The lower courts rejected plaintiffs' state constitutional argument, and so has the United States District Court for the Southern District of New York. *Miller* v. *American Steamship Owners Mutual Protection and Indemnity Co.,* 509 F.Supp. 1047 (S.D.N.Y. 1981).

Where no suspect classification or fundamental right is involved, the test of constitutionality is whether the statute has a rational relation to a legitimate state interest. *E.g., Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 489 (1977).

In *Plyler* v. *Doe,* 457 U.S. 202 (1982), this Court held that a third, or "intermediate", standard is to be applied to classifications which "while not facially invidious, nonetheless give rise to recurring constitutional difficulties . . . . " 457 U.S. at 217 (1982). Under that standard, a court asks whether the classification "may fairly be viewed as furthering a substantial interest of the State". 457 U.S. at 217-18 (1982). It is that standard which plaintiffs suggest should have been applied. (Pet., pp. 19-21)

There is no reason for this Court to grant the writ in order to rule upon plaintiffs' arguments concerning the intermediate standard. (See Pet., pp. 19-21) First, the Court need not grant the writ to consider whether the intermediate standard exists or the criteria for its application. Both of those issues were addressed last term in *Plyler.*

Second, plaintiffs make no claim that a decision by this Court as to the asserted applicability of intermediate standard will have any significance beyond this particular challenge to Section 167(4). The Petition therefore raises no important issue of law for the Court's consideration.

Third, the intermediate standard concerns classifications which give rise to "recurring constitutional difficulties", and thus it is applicable only where legislation discriminates against groups which

> "[w]hether or not the groups in question might qualify for treatment as 'discrete and insular minorities,' they bear enough resemblance to such minorities to warrant more than casual judicial response when they are injured by law." L. Tribe, *American Constitutional Law,* § 16-31, p. 1090 (1978).[3]

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[3] Accordingly, the intermediate standard has been applied to classifications such as gender, alienage and illegitimacy. *Plyler* v. *Doe,* 457 U.S. 202 (1982) (alienage); *Levy* v. *Louisiana,* 391 U.S. 68 (1968) (legitimacy); *Reed* v. *Reed,* 404 U.S. 71 (1971) (gender).

"Seamen" plainly do not constitute such a group. Indeed, to suggest that an occupation, which is freely entered and may freely be left, places someone in such a group fails to understand what heightened judicial review is all about and does nothing but demean the real suffering experienced by truly disadvantaged classes.

Fourth, the statute does not separately classify seamen; it treats maritime insurance differently from other types of insurance. Maritime situations are not the same as non-maritime, and therefore plaintiffs have failed even to raise an equal protection issue. As this Court put it: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler* v. *Doe,* 457 U.S. 202, 216 (1982). Moreover, plaintiffs concede that the statute treats identically all those involved in maritime torts (Pet., p. 18), and therefore to show that the statute discriminates against seamen, plaintiffs were required to prove that the statute was passed "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [seamen]". *Personnel Administrator* v. *Feeney,* 442 U.S. 256, 279 (1979); *accord, Harris* v. *McRae,* 448 U.S. 297, 323-24 n.26 (1980). No such evidence was offered or exists. The issue of what standard of review would be applicable to a statute which did discriminate against seamen is not present in this case; the question is academic at best.

B. No Important Issue Exists As To The State Purpose.

The district court reviewed the legislative purpose and held that Section 167(4) was rationally related to a legitimate state purpose. (App. D, pp. D-7, D-8) The Ninth Circuit affirmed. (App. F, p. F-2; 701 F.2d at 825) The District Court for the Southern District of New York reached the same result in another case. *Miller* v. *American Steamship Owners Mutual Protection and Indemnity Co.,* 509 F.Supp. 1047 (S.D.N.Y. 1981). There is no reason for this Court to review that factual determination.

II.

THE PURPORTED CHOICE OF LAW ISSUE IS NOT WORTHY OF REVIEW BY THIS COURT.

Plaintiffs ask this Court to review the lower court's application of New York law, saying that maritime insurance contracts should be governed by admiralty law. The issue is frivolous.

First, neither court below decided the issue. (See Rule 17.1) They did not do so because plaintiffs affirmatively argued that "STATE LAW GOVERNS" (CR 35, p. 3; App. A, p. A-4; 444 F.Supp. at 571), and did not appeal the district court's determination that the state law which governed was that of New York. (App. C, p. C-3 n.1; 640 F.2d at 995 n.1) There is no reason for this Court to address an issue which petitioners affirmatively agreed below does not exist. *See, e.g., Miree* v. *DeKalb County, Georgia,* 433 U.S. 25, 34 (1977) (Court will not consider issue which was "neither pleaded, argued, nor briefed" below); *Tennessee* v. *Dunlap,* 426 U.S. 312, 314 n.2 (1976); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 397-98 (1971).

Second, plaintiffs virtually concede that *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955), has already decided their nonissue and has resolved it against them. (Pet., p. 24) In *Wilburn* this Court ruled that the creation of any admiralty rule respecting marine insurance was for Congress, not the courts. 348 U.S. at 319-20. This case certainly is not an appropriate vehicle for this Court to reexamine *Wilburn* and Congress' twenty-eight year acceptance of it.

CONCLUSION

The Petition should be denied.

Dated: July 14, 1983

Respectfully submitted,

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